No. 77-1378

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAPAN LINE, LTD., ET AL., APPELLANTS

v.

COUNTY OF LOS ANGELES, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
M. CARR FERGUSON,
Assistant Attorneys General,

KENT L. JONES,
Assistant to the Solicitor General,

LEONARD SCHAITMAN,
ERNEST J. BROWN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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This brief is submitted in response to the Court's invitation of June 12, 1978.

QUESTION PRESENTED

Whether freight containers owned by Japanese shipping companies, carried in Japanese vessels engaged in commerce between the United States and Japan with their home port in Japan, intermittently in the United States to unload and load freight carried in foreign commerce, may be subject to personal

property taxes imposed by municipalities in the State of California.

STATEMENT

Appellants are Japanese shipping corporations, which have their principal places of business and commercial domiciles in Japan. They operate vessels used exclusively in foreign commerce. The vessels are registered in Japan and have their home ports in Japan. These vessels are designed and constructed to accommodate large shipping containers, and all cargo is brought onto the vessel, stored during transit, and removed at destination in these containers. The containers, which are owned by appellants, have their home port in Japan and are used constantly and exclusively for the transportation of cargo for hire in foreign commerce. Each container is in constant transit save for repair time and time awaiting the loading of cargo. All of the containers owned by appellants are subject to property tax in Japan and are in fact taxed in Japan (J.S. App. 2a-3a, 17a-18a).

A number of appellants' containers were present in the County of Los Angeles and the City of Los Angeles on the dates used by appellees for tax computation purposes.[1] None of these containers had been in California for as much as six months during the twelve months immediately preceding those dates. The average stay of the containers in California was less than three weeks (J.S. App. 2a-3a, 15a-16a, 18a). The fair market values of the containers present in the County and City of Los Angeles on the critical date of the years in question ranged from a low of $553,200 in the case of Showa Shipping Co. in 1971 to a high of $1,768,280 in the case of Kawasaki Kisen Kaisha, Ltd., in 1972. The County of Los Angeles and the City of Los Angeles levied the state property tax with respect to the assessed value of these containers.[2] The taxes for 1970 through 1972 were: Japan Line, Ltd., $100,632.85; Kawasaki Kisen Kaisha, Ltd., $117,616.44; Mitsui O.S.K. Lines, Ltd., $111,255.25; Nippon Yusen Kaisha, $110,175.04; Showa Shipping Co., $50,640.69; Yamashita-Shinnihon Steamship Co., Ltd., $69,416.39. Appellants paid the taxes under protest and filed a suit for refund in state court (J.S. App. 15a-17a).

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[1] Property present in California on March 1 of any year is subject to tax in the State. See California Revenue and Taxation Code, Sections 117, 405, and 2192 (West. 1970). This roughly apportions the property tax for mobile goods such as containers. Although no container is present in California consistently, some containers are there at any time. For example, if each container is present in California for approximately three weeks each year, the number of containers present in California on any arbitrarily selected date is approximately 3/52 of the total number of containers that enter California at any time during the year. The number of containers physically present in Los Angeles County on March 1 of 1970, 1971, and 1972, was representative of the number of containers present in Los Angeles County on other dates throughout the tax year.

[2] The property tax rate applied to the containers during the years involved in this case was approximately 11% of assessed value, and the assessed value of the property ordinarily is 25% of fair market value. See J.S. App. 16a.

The superior court held that the containers in question were instrumentalities of foreign commerce and therefore, under the "home port" rule of *Hays* v. *Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855), were immune from property taxation except in Japan (J.S. App. 26a-27a). The court also held (*id.* at 27a-28a) that imposition of the property tax by the County and the City was inconsistent with the provisions of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (4 U.S.T. 2063).[3]

The court of appeal, following the decision in *Sea-Land Service, Inc.* v. *County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56 (1974), a case involving a domestic carrier, rejected the "home port" rule as anachronistic and held that instrumentalities of foreign commerce are subject to apportioned property taxation (J.S. Supp. SA 5). The court also rejected the contention that property taxes on sea-borne containers temporarily off-loaded by vessels in foreign commerce constitute a duty of tonnage that is prohibited by Article I, Section 10, cl. 3 of the Constitution (J.S. Supp. SA 4-SA 6). Finally, the court concluded that the treaty provisions invoked by appellants have no application to state or local property taxation of

[3] The superior court relied principally on Article XI of the Treaty, which provides that nationals of the contracting parties are not to be assessed taxes "within the territories of such other Party, [that are] more burdensome than those borne by nationals and companies of such other Party." 4 U.S.T. at 2072.

instruments of foreign commerce (J.S. Supp. SA 6-SA 9). The court of appeal therefore reversed the judgment of the superior court (J.S. Supp. SA 9).

The Supreme Court of California affirmed the decision with some expansion and editorial emendations as its own opinion (J.S. App. 1a-13a).

SUMMARY OF ARGUMENT

The question in this case is whether the State of California or its cities and counties constitutionally may impose an annual ad valorem property tax on cargo containers owned by Japanese shipping lines, based and taxed in Japan, carried on Japanese ships engaged in commerce between Japan and the United States, and briefly in California for the sole purpose of discharging and loading cargo carried in foreign commerce by those ships.

In the view of the United States, they may not. This Court has long recognized that the Commerce Clause commits to the exclusive authority of the national government the regulation of those aspects of interstate and foreign commerce that, by their nature, require uniform national treatment. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). We believe that foreign-owned and foreign-domiciled instrumentalities of foreign commerce should be accorded uniform tax treatment. The necessary uniformity is supplied by this Court's decision that only the "home port" may impose ad valorem property taxes on sea-going ships. *Hays* v.

Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855).

The "home port" rule should apply to containers as well as to ships. The development of the container and the container-ship is one of the major advances in the technology of transportation, and the container has assumed a character as an instrument of commerce identical to the ship itself. It completes the voyage in foreign commerce not at the water's edge but only when it discharges the cargo that it carries. The United States recognizes the status of the container as comparable to that of a ship by adhering to the Customs Convention on Containers, 20 U.S.T. 301, whereby containers are admitted into the signatory nations for limited periods free of custom duties and restrictions. Neither the courts below nor the appellees have regarded the containers as different from the ships that carry them. Indeed, the California State Board of Equalization has proposed, as a result of the decision of the Supreme Court of California in this case, to impose its property tax on foreign aircraft arriving in California and operating solely in foreign commerce (App., *infra*, 1a-11a).

It is true that this Court recently has permitted non-domiciliary states to impose ad valorem property taxes on railroad rolling stock, vessels on inland waterways, and aircraft of domestic airlines, when the taxes were apportioned to reflect the extent to which the property was present in the taxing state. But in each case the Court observed that its decision did not relate to ocean-going vessels. The Court's

recent decisions not only leave unquestioned *Hays* and other decisions regarding the taxation of sea-going vessels but also hold that a system that permits imposition of apportioned property taxes by non-domiciliary states is not consistent with taxation of the full value of the property by domiciliary states. Because foreign nations have the power and right recognized by the custom of nations to tax the full value of the ships and containers of their nations, no system of apportionment can prevent multiple taxation. Any rule allowing property taxes to be collected by non-domiciliary jurisdictions would lead to multiple tax burdens and thus disadvantage one form of commerce solely because it is foreign.

This Court has not been reluctant to hold inoperative state statutes having impact upon foreign nationals or foreign commerce where it has perceived friction with federal policy or federal interests. We are informed by the Department of State that six foreign nations have expressed concern about California's tax on containers. See App., *infra*, 15a. Even more have raised questions about the State's proposal to impose its property tax on foreign airplanes. *Ibid.* If these expressions of concern are followed by action by nations feeling themselves disadvantaged, as we must anticipate they may be, the responsive action will affect not only California but also the United States.

Moreover, the action of California and the appellees in this case lessens the effectiveness of the Customs Convention on Containers in aiding foreign commerce

and interferes with the comprehensive scheme of federal regulation of instrumentalities of foreign commerce. The state tax thus constitutes an obstacle to the realization of the foreign policy of the United States. It intrudes, as the voice of one of 50 states, into an area where the United States has spoken and should continue to speak with one voice.

ARGUMENT

THE COMMERCE CLAUSE AND THE SUPREMACY CLAUSE DEPRIVE THE STATES OF AUTHORITY TO LEVY AD VALOREM TAXES ON FOREIGN-OWNED AND FOREIGN-DOMICILED SEA-BORNE CONTAINERS.

A. The "Home Port" Rule

In *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851), this Court for the first time dealt explicitly with the question (53 U.S. (12 How.) at 318) "whether the grant of the commercial power to Congress, did *per se* deprive the states of all power" to deal with foreign and with interstate commerce. The Court's response demonstrated the difficulties of giving an unvarying answer (*id.* at 319):

> Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. * * *

The *Cooley* formulation has at times been phrased somewhat differently (see *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775-776 (1945)), but in every case where the impact of a state statute on interstate or foreign commerce has drawn into question the constitutional validity of the statute, the Court has appraised the federal interest and the degree of state interference before giving a constitutional answer.[4]

Soon after the decision in *Cooley*, this Court held in *Hays* v. *Pacific Mail Steamship Co.*, *supra*, that California could not impose its property tax on an ocean-going vessel that was engaged in interstate and international commerce and that stopped in California ports to unload and load mail, passengers, and freight, and for repairs and refitting. The Court observed that the vessel was owned and registered in another state and that, while engaged in interstate and foreign trade, the vessel could not be regarded as "abiding within [the] limits [of California] so as to be-

[4] In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1948), for example, the Court found that an equal-accommodation statute of the State of Michigan could be applied to a vessel transporting passengers between Detroit and a nearby amusement park on Canadian soil. This was because, in the unusual circumstances of the case, there was "nothing out of harmony, much less inconsistent, with our federal policy in the regulation of commerce between the two countries; nor, so far as we are advised, with Canadian law and policy." *Id.* at 37. The Court was nevertheless careful to recognize that "we must be watchful of state intrusion into intercourse between this country and one of its neighbors." *Id.* at 35.

come incorporated with the other personal property of the state * * *." *Id.* at 599. Although California could impose "municipal and sanitary regulations * * * not inconsistent with the constitution and laws of the general government" (*ibid.*), the Court held that only the home port could impose a property tax. Accord, *Southern Pacific Co.* v. *Kentucky*, 222 U.S. 63 (1911); *Morgan* v. *Parham*, 83 U.S. (16 Wall.) 471, 477 (1872).

Although, as we discuss at pages 15-17, *infra*, this Court has held, with respect to various forms of domestic commerce, that the states may levy "apportioned" property taxes—that is, taxes fairly reflecting the extent to which particular transient property actually is present in a state—it has been careful in each case to exclude sea-borne transport from its holding. We believe that *Hays* continues to state a sound principle which rests on the uniform practice of nations and protects the federal interests in the regulation of sea-borne commerce, particularly in commerce with foreign nations, and in speaking with one voice in matters affecting our foreign relations. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976). As we shall indicate, the imposition of the tax by appellees entails substantial intrusion on these interests. We turn first, however, to consider the specific property involved, appellants' containers.

B. Appellants' Containers, Like The Ships That Carry Them, Are Instruments Of Foreign Commerce

In the technology of sea-borne transportation in recent decades, the container and the container-ship stand out as among the most significant developments:

> One of the most important technological developments in the transportation of goods by sea since steam replaced sail is the recent advent of the "container revolution". This radically novel concept of transferring, handling, stowing, discharging and delivering hundreds of packages simultaneously and mechanically by means of large reusable permanent metal containers, containerships, special container handling equipment and container terminals is so efficient a labor-saving device that it has already, to a large extent, altered conventional methods of shipping large numbers of packages individually. In short, containerization has rendered shipping "a whole new ball-game".

Simon, *The Law of Shipping Containers*, 5 J. Mar. L. Com. 507 (1974). Containers of the type involved in this litigation are not merely packages to contain goods, but are "a permanent, reusable article of transport equipment * * *." *Id.* at 513. A container is (*ibid.*)

> durably made of metal, and equipped with doors for easy access to the goods and for repeated use. It is designed to facilitate the handling, loading, stowage aboard ship, carriage, discharge from ship, movement, and transfer of large

> numbers of packages simultaneously by mechanical means to minimize the cost and risks of manually processing each package individually. It functions primarily as ship's gear for cargo handling, and is usually provided by the carrier.

As this Court put it, "the container is a modern substitute for the hold of the vessel." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 270 (1977). The Court held in *Caputo* that loading and unloading a container is the same thing as loading and unloading the ship itself, thus establishing that a container is "functionally a part of the ship * * *." *Leather's Best, Inc.* v. *S. S. Mormaclynx*, 451 F.2d 800, 815 (2d Cir. 1971).

The container, just as the ship, is continuously engaged in foreign commerce from the time its cargo is loaded and movement starts until its cargo is discharged at destination. As the superior court observed (J.S. App. 26a), the containers involved in this case "only come into this country for the purpose of bringing in cargoes or shipping them out in foreign commerce. There is no interstate or intrastate use." And the Supreme Court of California acknowledged (*id.* at 2a) that "[t]hey are used exclusively for the transportation of cargo for hire in foreign commerce." [5]

[5] This Court recognized as early as 1824, in the seminal opinion of Chief Justice Marshall in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195, that foreign commerce "does not stop at the jurisdictional lines of the several States" but proceeds within the states until the movement in commerce is completed. See also *Henderson* v. *Mayor of New York*, 92 U.S. 259, 271 (1875).

The United States, in common with many other nations, recognizes containers as instruments of foreign commerce integral to the ships that carry them. Chapter II, Article 2 of the Customs Convention on Containers, 20 U.S.T. 301, 304, provides for the "temporary admission [of sea-borne containers] free of import duties and import taxes and free of import prohibitions and restrictions" when they are imported for use solely in foreign commerce and subject to reexportation. Similarly, 19 C.F.R. 10.41a(a)(3)[6] designates sea-borne containers as "instrumentalities of international traffic" within the meaning of 19 U.S.C. 1322. Pursuant to these regulations and Section 1322, containers may be bonded and "released without entry or the payment of duty" so long as they are used exclusively in foreign commerce and subject to reexportation. 19 C.F.R. 10.41a(a)(1), (c). In a number of bilateral income tax conventions, including the Convention Between the United States of America and Japan, 23 U.S.T. 967, 987, 1084, and 1093, the United States further associates containers with the ships that carry them by providing that the income from the use of containers and related equipment in international traffic shall be treated in the same fash-

[6] 19 C.F.R. 10.41(a)(3) provides:

> As used in this section, "instruments of international traffic" includes the normal accessories and equipment imported with any such instrument which is a "container" as defined in Article 1 of the Customs Convention on Containers.

ion as income from the ships in connection with which they are used.

Neither the court below nor appellees have sought to treat the appellants' containers as other than instrumentalities of foreign commerce or to differentiate them in any fashion from the ships that were designed and constructed to carry them. Indeed, after the decision of the Supreme Court of California in this case, the California State Board of Equalization gave notice of public hearing on its proposal to amend the California Administrative Code to make foreign aircraft operated solely in foreign commerce subject to property taxation in California. App., *infra*, 1a-11a. The notice of public hearing was cancelled, subject to possible rescheduling, only after this Court set the present case for oral argument (*id.* at 12a-13a).

For these reasons, we believe that the question of the states' constitutional power to tax appellants' containers is not distinct from the question of their power to tax the vessels on which the containers are carried.

C. Imposition Of The Ad Valorem Tax On Appellants' Ships Or On The Containers Carried In Them Is Inconsistent With The Exclusive Authority Of The Federal Government To Regulate Foreign Commerce

As we have noted, this Court held in *Hays* v. *Pacific Mail Steamship Co.*, *supra*, in *Morgan* v. *Parham*, *supra* and in *Southern Pacific Co.* v. *Kentucky*, *supra*, that only the home port, or the jurisdiction in which it is located, may impose a property tax on ocean-going ships. Other ports in which those

ships may be found from time to time may not constitutionally impose a general property tax on the vessels. Those decisions, expressing the mandate of the Constitution, express as well the custom of nations. We are informed by the Department of State that after inquiry of its posts abroad, it determined that only one nation, Afghanistan, imposes property taxes on foreign containers or other instruments of foreign commerce entering its jurisdiction (App., *infra*, 14a). All other nations have adhered to the international custom of allowing containers, as well as vessels and other instruments of foreign commerce, to be introduced for the exclusive purpose of conducting such commerce free of all customs duties and general taxes, including property taxes.[7] Cf. 19 U.S.C. 1322; 19 U.S.C. 1202 (General Note 5(e)). Although positive law may override international customs that bear on ships and instruments of commerce of other nations, see *The Exchange*, 11 U.S. (7 Cranch) 116, 136, 144 (1812), such law can be enacted only at the national level if the nation is to speak with one voice in matters of foreign commerce.

It is true that, with respect to the several forms of inland transportation, this Court has held that instrumentalities of interstate commerce are subject

[7] "Fees" that are related to the value of specific services provided to vessels and containers, as opposed to general taxes to support the operations of government (see *National Cable Television Association* v. *United States*, 415 U.S. 336, 340-341 (1974)), are, however, permissibly charged under the custom of nations. See App., *infra*, 14a-15a. Cf. *Hays* v. *The Pacific Mail Steamship Co.*, *supra*, 58 U.S. (17 How.) 596; *Packet Co.* v. *Keokuk*, 95 U.S. 80, 88-89 (1877).

to apportioned property taxation by the states in which they operate. But in each instance it has been careful to state that its decision did not involve foreign or ocean-borne commerce. In *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 23-24 (1891), upholding apportioned property taxation of railroad rolling stock engaged in interstate commerce, the Court explicitly differentiated the case of ships and vessels upon the high seas. Quoting from *Railroad Co.* v. *Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874), the Court pointed out (141 U.S. at 24) that:

> Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land.

Similarly, when the Court upheld apportioned property taxation of barges on the Mississippi River by non-domiciliary states in *Ott* v. *Mississippi Barge Line*, 336 U.S. 169 (1949), it was careful to point out that "[w]e do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." *Id.* at 173-174. And in *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590 (1954), upholding Nebraska's apportioned property taxation of the aircraft of an airline domiciled in another state, the Court differentiated the "home port" rule in *Hays* and other decisions involving sea-borne transportation, remarking (347 U.S. at 600):

> A closer analogy exists between planes flying interstate and boats that ply the inland waters. We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats. *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 * * *.

But the Court has done more than leave *Hays* and companion decisions unquestioned. It has held in *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952), that its decisions upholding apportioned property taxation of vessels on inland waters, and of aircraft of domestic airlines engaged in interstate flights, necessarily entailed disapproval of taxation of the full value of those instrumentalities of interstate commerce by the jurisdictions of the domicile or home base of the owner (*id.* at 384): "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile." Accord, *Braniff Airways, Inc.* v. *Nebraska State Board*, *supra*, 347 U.S. at 601-602. In other words, one of the foundations for the Court's approval of apportioned property taxation has been its ability to enforce full apportionment by *all* of the potential taxing bodies, so that no property was subject to multiple taxation on its full value.

But neither the Court nor the United States as a whole can ensure full apportionment when one of the

taxing bodies is a foreign nation. We deal here with ships, and containers, owned by Japanese corporations, based in Japan, subject to property taxation in Japan, and in fact taxed in Japan (J.S. App. 18a). As the superior court pointed out (*id.* at 28a): "There is no way to prorate the [taxes on this property], as we do in interstate commerce. The Japanese would be paying a double tax, while a domestic company would, by reason of proration, be paying only one tax." The multiple burden that unapportioned taxation places on foreign-owned instruments of foreign commerce is thus a reality and not merely "an abstraction." *Department of Revenue* v. *Association of Washington Stevedoring Companies*, No. 76-1706 (April 26, 1978), slip op. 11 (hereafter *Washington Stevedoring*).[8] Only the application of the "home port" rule

[8] In *Washington Stevedoring* this Court upheld application of a general state occupations' tax to stevedoring. The Court stated that, because the incidence of the tax was on stevedoring services performed wholly within one state, "the tax is properly apportioned and multiple burdens logically cannot occur." Slip op. 11. In this case, however, the incidence of the tax is on property employed as an instrumentality of foreign commerce that comes within the jurisdiction of several nations. Each nation may claim a right to tax all or part of the property value. Moreover, in *Washington Stevedoring* the Court was careful to observe that the tax on stevedoring did not interfere with our foreign relations because it was applied to services performed wholly in the State of Washington and was not assessed against any "foreign business or vessel * * *." *Id.* at 19. The tax involved in this case has directly affected our foreign relations by its application to foreign-owned instruments of foreign commerce. See pages 20-22, *infra*.

can make our practice consistent with that of other nations and avoid a multiple tax burden on foreign commerce that domestic commerce does not share.

This Court has held that a state tax or regulation that disadvantages interstate or foreign commerce simply because it is interstate or foreign interferes with the exclusive national authority to regulate such commerce and is thus invalid under the Supremacy Clause. See *Washington Stevedoring*, *supra*, slip op. 15; *EVCO* v. *Jones*, 409 U.S. 91, 93-94 (1972); *Harvester Co.* v. *Department of the Treasury*, 322 U.S. 340, 349, 358-362 (1944) (Rutledge, J., concurring); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938). The Supreme Court of California reasoned in this case, however, that the double taxation of foreign-owned containers that results from the state scheme is "not attributable to * * * the taxing state" but instead to the foreign state, and that it can be alleviated by "international agreement" (J.S. App. 6a). But the state cannot dictate to the United States or to foreign nations how to agree on matters of foreign policy or foreign commerce; nor can the national government unilaterally impose international agreements on foreign nations.[9] The state tax must thus be evaluated within the realistic framework of the custom of nations; it is within that framework that the state tax creates an imper-

[9] Nothing could prohibit the Government of Japan from taxing its nationals and corporations on the full value of their property, and it now does so.

missible multiple burden on foreign-owned instruments of foreign commerce.[10]

If it were thought that treaties could or should be adopted to establish systems of apportioned taxation of property in international commerce, this would, of course, be a matter of national, not state concern. We are informed by the Department of State that six foreign governments, including some of our most important trading partners, have written to the Department expressing concern about the effect on foreign commerce of the California container tax (App., *infra*, 15a). In addition, 12 countries have sent diplomatic notes concerning the stated intention of

[10] The discriminatory burden of the state's tax on foreign-owned instrumentalities of foreign commerce is sufficient by itself to invalidate the tax under the Commerce Clause. We note, however, that it appears that the tax, as applied to foreign-owned containers, may be invalid for the additional reason that it is not fairly related to the services provided by the State. Although the factual record in this case is inadequate to support firm conclusions, it seems implicit from the findings of the superior court (J.S. App. 16a-19a) that, for the large part of their presence in this country, the containers taxed in this case are located at the wharf or in related dockside facilities. While they are thus located, they are subject to ordinary wharfage or dockage fees assessed as compensation for services actually provided by the State. See California Harbors and Navigation Code, Section 4122 (West. 1978); Appellants' Br. 46-47. Additional general taxation on an ad valorem basis could thus subject the containers to taxation by the State twice under the same theory for the same services. The case is thus distinct in this regard from the general occupations tax upheld in *Washington Stevedoring*, *supra*, and the general ad valorem tax upheld in *Michelin Tire Corp.* v. *Wages*, *supra*, where no double taxation by the assessing state was involved.

the State of California (*id.* at 1a-11a) to permit local personal property taxation of foreign flag aircraft flown to and from California in foreign commerce (*id.* at 15a). These expressions of concern over action disadvantageous to our trading partners may be followed, if they produce no satisfactory response, by other action. If the California tax should lead to responsive actions (say, the imposition of countervailing taxes) by nations deeming themselves disadvantaged, it could be anticipated that the responsive action would be not to California, or to California interests alone, but to the interests of the United States.[11]

This case thus falls within the scope of the rule, stated in *Moorman Manufacturing Co.* v. *Bair*, No.

[11] This Court recognized an analogous situation in *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875). California had detained a number of immigrant passengers on a ship from China because of their failure to give bond, required by a California statute, intended to indemnify counties, towns, and cities against liability for their support or maintenance for two years. In holding that the Constitution prohibited California's scheme, the Court pointed out (*id.* at 279):

> * * * [I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?

77-454 (June 15, 1978), slip op. 12, that "the freedom of the States to formulate independent policy in [the] area [of commerce] may have to yield to an overriding national interest in uniformity * * *." "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). The taxation of foreign-based instruments of foreign commerce is thus a matter that is subject only to a national rule conformable with the practice of nations or adopted pursuant to the authority of the federal government.

D. Imposition Of The Tax On Appellants' Ships Or The Containers Carried In Them Interferes With The Objectives Of The Customs Convention On Containers And The Comprehensive Scheme Of Federal Regulation Of Instrumentalities Of Foreign Commerce

The Commerce Clause affords Congress the power to "regulate commerce with foreign nations, and among the several States * * *." Although a state may, in some circumstances, take action that affects foreign or interstate commerce, a state may not intrude in an area where there is pervasive federal regulation. *Ray* v. *Atlantic Richfield Co.*, No. 76-930 (March 6, 1978); *Campbell* v. *Hussey*, 368 U.S. 297, 300 (1961). Nor may a state take action that defeats the objectives of federal regulation. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229-230 (1947). In the instant case, a comprehensive arrangement of federal regulation has been adopted;

this arrangement precludes general state taxation [12] of foreign-owned instruments of foreign commerce, and of sea-borne containers in particular.[13]

Article 2 of the Customs Convention on Containers requires the United States to grant "temporary admission free of import duties and import taxes and free of import prohibitions and restrictions * * * to containers" used exclusively in international commerce. 20 U.S.T. at 304.[14] Article 1(a) of the Con-

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[12] Tolls and fees charged in connection with specific services rendered by the states to instruments of foreign commerce are not affected by the federal scheme. See note 7, *supra*. Cf. *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1882). Nothing in our argument or in the Court's cases would prevent the states from collecting wharfage fees and other similar user charges.

[13] Appellants argue (Br. 32) that Article XI of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan (4 U.S.T. 2063) prohibits application of the state tax to their containers. The United States does not support this contention. Article XI states only that nationals of the contracting parties are not to be assessed taxes "within the territories of such other Party, [that are] more burdensome than those borne by nationals and companies of such other Party." 4 U.S.T. at 2072. This provision guarantees that the United States will not levy on Japanese nationals, "within the [United States]," taxes that exceed those that it levies on its own nationals. The treaty does not purport to equalize world-wide tax burdens; so long as appellants are not treated differently from United States citizens under domestic tax statutes, the treaty has no application.

[14] Under Article 11 of the Customs Convention on Containers, 20 U.S.T. at 308, containers that are used "even occasionally" for domestic traffic while in a foreign nation may be subjected to duties and taxes within that nation.

vention provides that "the term 'import duties and import taxes' shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." *Ibid.* The obligations of the United States under the Convention are implemented by regulations (19 C.F.R. 10.41a) adopted by the Secretary of the Treasury pursuant to Section 322(a) of the Tariff Act of 1930, 19 U.S.C. 1322(a). This statute authorizes the Secretary to grant the "customary exceptions from the application of the customs laws" to "[v]ehicles and other instruments of international traffic."

Under the Secretary's regulations and the Customs Convention itself, the United States allows the temporary admission of containers without formal entry into the commerce of the United States,[15] and without payment of duty, when the containers are being used exclusively in international commerce. Customs Convention on Containers, Articles 3, 11, 20 U.S.T. at 306, 308; 19 C.F.R. 10.41a(a)(1), (c), (f).[16] Admission is conditioned, however, on payment of a bond (1) to secure compliance with the requirement

[15] All imported articles (with certain specified exceptions) must be formally entered into the commerce of the United States within five days of arrival in a port of the United States. 19 U.S.C. 1484.

[16] Reexportation may be excused because of damage to the container or at the election of the owner. However, customs duties will then become applicable (Customs Convention on Containers, Article 4, 20 U.S.T. at 306) and the container must then be formally entered into commerce under 19 U.S.C.1484. See note 15, *supra*.

that the containers be reexported and (2) to ensure that the container is used exclusively for foreign commerce. 19 C.F.R. 10.41a(c). See note 14, *supra*. The effect of granting temporary admission in a bonded status for containers used exclusively in foreign commerce is to preclude these articles from entering the commerce of the United States. The containers cannot be used for the transportation of goods in interstate commerce or be sold or used in domestic commerce without losing their status as "instruments of international traffic" and becoming subject to formal entry and the assessment of duties. 19 C.F.R. 10.41a(d).[17]

In allowing the temporary admission of such articles under bond and without formal entry into the commerce of the United States, the national government has given to "instruments of international traffic," and to shipborne containers in particular, the same status it gives under the customs laws to articles admitted to a "bonded manufacturing warehouse." 19 U.S.C. 1311. Under the analogous "bonded warehouse" provision, articles may be admitted into the United States under bond, altered by "manufacture * * * while in bond * * * and then withdraw[n] * * * for export * * * free of the import duty which would otherwise be payable."[18] In *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), this Court

[17] Similar treatment is afforded under the customs laws for the supplies and stores that are retained on vessels arriving in the United States from foreign ports. 19 U.S.C. 1446.

[18] *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 422 (1940).

held that a state may not impose its general sales tax on articles brought into the United States pursuant to the bonded warehouse provision. The Court determined that the federal exemption from customs duties for articles admitted to a bonded warehouse under 19 U.S.C. 1311 is "tantamount to a declaration that * * * the imported merchandise shall not become a part of the common mass of taxable property within the state * * * and shall not become subject to the state taxing power." *Id.* at 429. The Court's reasoning was based on the fact that the "obvious tendency of the [federal] exemption" from duties for articles admitted to a bonded warehouse "is to encourage" the commerce that would otherwise be hindered by the imposition of the tax. *Id.* at 427; see *id.* at 428. As the Court noted, however, (*id.* at 429):

> It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty. See, *People* v. *Compagnie Generale Transatlantique*, 107 U.S. 59, 63.

Because the state tax conflicted with the accomplishment of the congressional purpose, the Court concluded that the "state tax in the circumstances must

fail as an infringement of the Congressional regulation of the commerce." 309 U.S. at 429.[19]

The rationale of *McGoldrick* applies here as well.[20] The national government admits containers employed in foreign commerce to the United States under bond for exclusive use in such commerce and subject to the requirement that they be reexported. By admitting the containers under bond, and subject to reexportation, the federal regulations implementing the Customs Convention on Containers prevent the containers from becoming part of domestic commerce. Because they are not in United States commerce, the containers may not be regarded as "a part of the common mass of taxable property within the state * * *." *McGoldrick* v. *Gulf Oil Corp., supra*, 309 U.S. at 429; see *Ammex Warehouse Co.* v. *Department of Alcoholic Beverage Control*, 224 F. Supp. 546, 555

[19] In *McGoldrick*, the Court also noted that customs regulations had expressly declared that merchandise in bonded warehouses "should be free from state taxation." *Ibid.* The Court did not rely on the regulations, however. The Court held that the regulations state "only what is implicit in the Congressional regulation" of the commerce. *Ibid.*

[20] It is not necessary for the Court to decide whether the Convention establishes the importance of uniformity and thus leads to invalidation of the state tax under the Commerce Clause or whether, instead, the Convention is a law of the United States leading to preemption of the state tax. The analysis is much the same. Compare *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429 (1978), with *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977). The dispositive feature under either analytical approach is that the federal government has established that disparate state laws offend a perceived need for nationwide uniformity.

(S.D. Cal. 1963), and thus are not subject to state taxation.

A state tax would frustrate accomplishment of the federal objective in allowing temporary free admission to containers under bond. The purpose of the Customs Convention on Containers, as implemented under 19 U.S.C. 1322, is to "develop and to facilitate the use of containers in international commerce." 20 U.S.T. at 304.[21] To achieve this purpose, containers have been afforded immunity from "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." Customs Convention on Containers, Article 1, 20 U.S.T. at 304. The substantial general state property tax that has

[21] The federal regulatory policy of fostering the unrestricted use of transportation equipment in international commerce extends to the treatment of other kinds of transportation equipment, including vessels and aircraft engaged in international commerce. See 19 C.F.R. 10.41a. Just as in the case of containers designated as "instruments of international traffic," vessels and aircraft engaged exclusively in international commerce normally arrive in and depart from the United States without formal entry as imported merchandise under 19 U.S.C. 1484, appraisement or assessment of duties. Vessels are subject to the special entry provisions of 19 U.S.C. 1434 and 1435, and implementing regulations, 19 C.F.R. Part 4. These provisions also apply to the arrival and departure of aircraft pursuant to Section 1109(c) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1509(c), and implementing regulations, 19 C.F.R. Part 6. The federal regulatory scheme for aircraft implements Article 24 of the Chicago Convention on International Civil Aviation, 61 Stat. 1186, which obligates the United States temporarily to admit aircraft in international commerce free of duty.

been assessed against the containers involved in this case (J.S. App. 16a) conflicts with the spirit and design of the federal scheme.[22] It lessens the effectiveness of the federal regulation by burdening foreign-owned containers with a multiple tax burden that hinders the use of such containers in our foreign commerce.

Moreover, to the extent that the tax may lead to the imposition of retaliatory taxes by our trading partners (see page 21, *supra*), the interference with the widespread use of containers in international commerce would be greatly magnified. Thus, in its "practical operation," see *First Federal Savings & Loan Association* v. *Tax Commission*, No. 77-334 (June 15, 1978), slip op. 4, the state tax interferes with the objectives of the federal regulation of this aspect of foreign commerce. The state tax "stands as an obstacle to the accomplishment and execution

[22] The uniform practice of nations has been to exempt foreign-owned containers from all taxes resulting merely from the presence of the containers in the receiving nation but to permit the assessment of "fees" related to services in fact rendered. The conduct of the parties to this treaty bears significantly in understanding its proper effect. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 294-295 (1933).

The fact that Japan did not become a signatory of the Customs Convention on Containers until 1972 (Br. 33 n. 9)—the last of the three tax years here in question—is not critical to the resolution of this case. The immunities established under that Convention were enacted into positive law of the United States through promulgation of the generally applicable regulations in 19 C.F.R. 10.41a. The significance of the treaty itself is primarily in demonstrating the federal intent in adopting the federal regulatory scheme.

of the full purposes and objectives" of the federal regulation of commerce, *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), and is thus invalid as an interference with the exclusive federal authority to regulate commerce.[23] See *Ray* v. *Atlantic Richfield Co.*,

[23] Although, for the reasons set out in the text, we agree with appellants that California may not levy a property tax on appellants' containers, we do not agree with all of appellants' arguments. For example, as we indicate in note 13, *supra*, the Treaty of Friendship, Commerce and Navigation with Japan does not apply to taxes levied at equal rates on all property. We disagree with several of appellants' other arguments as well. Appellants argue that a federal excise tax, 46 U.S.C. 121, prevents state taxation of their containers (Br. 28). But this statute does not apply to containers admitted pursuant to the Convention under bond, and the imposition (or non-imposition) of a particular federal tax would not, in any part, preclude state taxation of the same property. See Federalist Papers No. 32-34 (*The Federalist* 240-253 (B. Wright ed. 1961)).

Appellants argue (Br. 28) that the state taxes violate "various aviation treatise and agreements" and "the GATT." They do not identify any "aviation treaty," and so it is not possible to respond to this argument. The GATT—the General Agreement on Tariffs and Trades, 61 Stat. A3—does not deal with state taxation of containers, and appellants do not point to any provision of the GATT that would be relevant to this case. At all events, the GATT is an executive agreement rather than a treaty, and we do not argue that it would of its own force nullify any state law. Cf. *Zenith Radio Corp.* v. *United States*, No. 77-539 (June 21, 1978), slip op. 13 n. 13. In some situations the GATT would have persuasive force in demonstrating a need for national uniformity or in demonstrating international custom, and thus in establishing that particular taxes are unconstitutional under the Commerce Clause, but this argument is not available here.

Appellants also maintain that the state taxes violate the Duty of Tonnage Clause (Br. 35-37) and the Due Process

Clause (Br. 48-49). The former argument fails because the tax is not based on the weight, amount, or value of the cargo that may have been in the containers; it is levied on the containers themselves. Moreover, the tax does not appear to be a subterfuge for a Duty of Tonnage. The due process argument is unpersuasive under the standards of *Lehnhausen* v. *Lake Shorte Auto Parts Co.*, 410 U.S. 356 (1973).

Appellants' argument based on the Import-Export Clause (Br. 37-43), however, is more substantial. Until recently this Court consistently held "that all [state] taxes on imports and exports and on the importing and exporting processes were banned by the Clause." *Washington Stevedoring*, *supra*, slip op. 16. The tax on containers unquestionably burdens the "importing and exporting process" and consequently, under a long line of decisions, would violate the Import-Export Clause.

Washington Stevedoring and *Michelin Tire Corp.* v. *Wages*, *supra*, however, have fundamentally altered the approach to Import-Export Clause cases. The essential inquiry now is not the burden of the tax, but whether the tax is an "Impost or Duty." Those words historically have included only taxes "directed at imports or commercial activity as such" (423 U.S. at 292), and it is difficult to contend that the California tax, levied on the general mass of property within the State, is a tax "directed at imports or commercial activity as such."

Nevertheless, we believe that the California tax offends the purposes of the Import-Export Clause, which the Court identified in *Michelin*, *supra*, 423 U.S. at 285-286. As the Court pointed out, "the Federal Government must speak with one voice when regulating commercial relations with foreign governments," and state taxes sometimes could upset foreign trade or intrude on matters exclusively within the national prerogative. For the reasons discussed in the text, we submit that the property tax at issue here could disrupt the foreign relations of the United States, and that it frustrates the ability of the national government to conduct trade with foreign nations. The state tax intrudes into an area where the United States "must speak with one voice" (*Michelin*, *supra*, 423 U.S. at 285) and thus violates the Import-Export Clause as well as the Commerce Clause. Because the arguments under the two constitutional provisions are so similar in the circum-

No. 76-930 (March 6, 1978), slip op. 5; *McGoldrick v. Gulf Oil Corp., supra*, 309 U.S. at 429.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
M. CARR FERGUSON,
Assistant Attorneys General.

KENT L. JONES,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
ERNEST J. BROWN,
Attorneys.

SEPTEMBER 1978.

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stances of this case, however, we have not elaborated on the Import-Export Clause argument. It is enough to note here that neither *Michelin* nor *Washington Stevedoring* undermines our submission. In both cases the Court pointed out that the tax it upheld did not affect the authority of the federal government to conduct foreign relations (423 U.S. at 286; *Washington Stevedoring, supra*, slip op. 19); in both cases there was no possibility of a multiple tax on the same property or services (*Washington Stevedoring, supra*, slip op. 19); in both cases the taxes were levied on goods or services fully admitted to the commerce of the United States and the goods were no longer in transit (423 U.S. at 289-290; *Washington Stevedoring, supra*, slip op. 23). Here, by contrast, the tax affects foreign relations, causes multiple tax burdens, and is levied on containers that are still part of foreign commerce and have never been formally entered into United States commerce.

APPENDIX A

STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)
916/445-6479

March 24, 1978

78/49

TO COUNTY ASSESSORS, COUNTY COUNSELS AND OTHER INTERESTED PARTIES:

Enclosed is a copy of a notice of public hearing to be held June 29, 1978, at 10:00 a.m. in Room 102, 1020 N Street, Sacramento, California on a proposed amendment to property tax Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operations.

The amendment extends the situs rule of subdivision (b) of Rule 202 to aircraft operated solely in foreign commerce. The Board's legal staff is of the opinion that two recent cases, Sea Land Service v. County of Alameda, 12 Cal. 3d 772, and Japan Line, Ltd. v. County of Los Angeles, 23 Cal. 3d 180, have overturned the former rule that aircraft operated solely in foreign commerce are protected from state property taxation by the Home-Port Doctrine. These two cases hold that the Home-Port Doctrine does not shield property with situs in California from taxation on an apportioned basis. Because our property tax rules are merely declarative of existing law, we

propose to amend Rule 202 to conform to these court decisions.

Written comments with respect to the enclosed notice are welcome and should be directed to me. If you wish to present testimony pertaining to the amendment at the hearing, please notify me by mail or telephone by June 14, 1978, so that an orderly agenda can be prepared.

Sincerely,

/s/ Janice Masterton
JANICE MASTERTON
Calendar Clerk

JM/se
Enclosure

NOTICE OF PROPOSED CHANGES IN THE REGULATIONS OF THE STATE BOARD OF EQUALIZATION

Notice is hereby given that the State Board of Equalization, pursuant to the authority vested by Section 15606 of the Government Code, and to implement, interpret or make specific Sections 1150 through 1156 of the Revenue and Taxation Code proposes to amend Section 202(b) of Article 5, Subchapter 2, Chapter 1, Title 18, of the California Administrative Code, as follows:

1. Amend Section 202, subsection (b), Article 5, subchapter 2, chapter 1 to read:

Rule No. 202. (Cal. Adm. Code) ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(b) SITUS. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve

embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, *nor by the fact that the aircraft is operated solely in foreign commerce.*

Notice is also given that any person interested may present statements or arguments orally or in writing relevant to the action proposed, at Room 102, Consumer Affairs Building, 1020 N Street, Sacramento, CA 95814 at 10:00 a.m. on June 29, 1978. The State Board of Equalization upon its own motion or at the instance of any interested person, may thereafter adopt the above proposed amendment substantially as set forth without further notice.

Upon request, copies of the above regulation may be obtained from:

State Board of Equalization
1020 N Street
Sacramento, California 95814

The State Board of Equalization, has determined that, pursuant to Section 2231 of the Revenue and

Taxation Code, no increased costs or new costs to local government will result from this regulation.

Dated: March 15, 1978

STATE BOARD OF EQUALIZATION

/s/ Gordon P. Adelman
for DOUGLAS D. BELL
Executive Secretary

STATE OF CALIFORNIA

BOARD OF EQUALIZATION
PROPERTY TAX DEPARTMENT

PROPERTY TAX RULES AND REGULATIONS

Chapter 1. State Board of Equalization—Property Tax

Subchapter 2. Assessment

Article 5. Situs

References: Sections 1150-1156, Revenue and Taxation Code

Rule 202. ALLOCATION OF AIRCRAFT OF CERTIFICATED AIR CARRIERS AND SCHEDULED AIR TAXI OPERATORS

(a) AIR TAXIS. An aircraft whose owner on the lien date used it in scheduled air taxi service at any time during the representative period selected pursuant to subsection (f), or which has been purchased for scheduled air taxi service but not yet put into such service and not yet used in any other service, is assessable under sections 1150 to 1156 of the Revenue and Taxation Code and not under Part 10, Division 1, or under other situs provisions of Part 2, Division 1, of the Revenue and Taxation Code.

(b) SITUS. Aircraft operated by certificated air carriers (within the meaning of section 1150 of the Revenue and Taxation Code) or scheduled air taxis (within the meaning of subdivisions (a) and (b) of

section 1154 of the Revenue and Taxation Code) and flown in intrastate, interstate, or foreign commerce shall be deemed to be situated only in those taxing agencies (within the meaning of section 404 of the Revenue and Taxation Code) in which the aircraft normally make physical contact. The physical contact must be intentional rather than by accident or as the result of an emergency, and it must involve embarking or disembarking of crew, passengers, or freight.

Aircraft flying over the state without landing do not acquire situs for property tax purposes. Conversely, the situs of aircraft that depart from a taxing agency within the state, fly out of the state, and return to the same or another taxing agency within the state without landing outside the state is within the state's taxing jurisdiction throughout the flight.

Situs for property tax purposes is not affected by the legal or commercial domicile of the operator of the aircraft, *nor by the fact that the aircraft is operated solely in foreign commerce.*

(c) ALLOCATION FORMULA. The allocation formula to be used by each assessor is composed of two factors: (1) ground and flight time and (2) aircraft arrivals and departures.

Time allocable to an airport is the amount of time that certificated aircraft and scheduled air taxis are on the ground at the airport, plus a portion of the incoming and outgoing flight time computed pursuant

to subsection (d). The ratio of the time allocable to the airport during a representative period to the sum of the time allocable to the airport and the time allocable elsewhere is the ground and flight time factor. In computing the ground and flight time factor, the following shall be excluded:

From the time allocable to the airport—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

(2) All ground time in excess of 12 consecutive hours at the airport following entry into revenue service.

From the total time—

(1) All ground and flight time prior to the aircraft's first entry into the revenue service of the air carrier in control of the aircraft on the current lien date.

This factor shall be multiplied by 75 percent to obtain a weighted ground and flight time factor.

The aircraft arrivals and departures factor is the ratio of the number of arrivals at and departures from an airport during a representative period to the total number of arrivals at and departures from all airports during the representative period. This factor shall be multiplied by 25 percent to obtain a weighted arrivals and departures factor.

The weighted time factor shall be added to the weighted arrivals and departures factor. The sum of the two weighted factors yields the allocation ratio to be applied to the full cash value of the aircraft to determine the full cash value allocable to the airport.

(d) ALLOCATION OF FLIGHT TIME. For aircraft flying from one California airport to another California airport, the flight time attributable to each airport is one-half the flight time between the airports.

For aircraft arriving from an airport outside the state or leaving for an airport outside the state, the flight time from or to the state boundary shall be allocated to the California airport in which the aircraft first lands or last takes off, as the case may be. The flight time to the state boundary crossing point on a great circle flight to the first landing point outside the state; (2) divide this mileage by the total great circle mileage from the airport to the first landing point outside the state; (3) multiply this percentage by the total flight time from the airport to the first landing point outside the state. The same procedure shall be used for inbound flights from outside the state. To allow for differences in take-off, landing, and cruising speeds and for varying take-off and landing patterns, the time allocated to an airport shall not be less than five minutes for an incoming or an outgoing flight. In lieu of the actual flight time for a single flight, the average flight time between two ports, or between a port and the state line, for

two or more flights of a single carrier or of more than one carrier shall be used when such an average is promulgated by the board unless the assessor has documented evidence which justifies departure from such average time.

(e) SOURCES OF ALLOCATION DATA. For scheduled operations, arrivals and departures and ground and flight time shall be derived from the carrier's operating schedules. For nonscheduled operations, including but not limited to, overhaul, pilot training, charter, military contract flights, and standby services, ground and flight time and arrivals and departures shall be derived from the carrier's recorded operations.

(f) REPRESENTATIVE PERIOD. Annually, on or before February 15, the board shall consult with the assessors of the counties in which air carriers' aircraft normally make physical contact. On or before March 1, the board shall designate a representative period to be used by all assessors in assessing the aircraft of each carrier for the forthcoming fiscal year.

(g) APPLICATION OF ALLOCATION FORMULA. The aircraft of certificated air carriers and scheduled air taxi operators shall be segregated by type, and a separate allocation ratio shall be computed for each type which has established a tax situs within the state, excluding those makes within a type which have not established a tax situs within the state. Each allocation ratio shall then be applied to

the total value of the carrier's aircraft of each type to which the allocation ratio applies, excluding those makes within a type which have not established a tax situs within the state.
The types are as follows:

(1) Piston-powered
(2) Turboprop-powered
(3) Helicopter
(4) Turbojet and Turbofan powered

(A) Two engine
(B) Three engine
(C) Four engine
(D) DC-8-60 series
(E) Boeing 747
(F) DC-10 and L 1011

History: Adopted March 9, 1967, effective March 10, 1967.

Amended January 8, 1969, effective February 12, 1969.

Amended December 12, 1969, effective January 11, 1970.

Amended February 16, 1970, effective March 26, 1970.

Amended December 20, 1971, effective January 19, 1972.

Amended February 21, 1974, effective February 26, 1974.

Amended December 17, 1975, effective January 25, 1976.

APPENDIX B

STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION
1020 N Street, Sacramento, California
(P.O. Box 1799, Sacramento, California 95808)
916/445-6479

June 16, 1978

78/104

TO COUNTY ASSESSORS, COUNTY COUNSELS AND OTHER INTERESTED PARTIES:

CANCELLATION OF PUBLIC HEARING—RULE 202

This is to inform you of the cancellation of public hearing of proposed amendments to Rule 202, Allocation of Aircraft of Certificated Air Carriers and Scheduled Air Taxi Operators, originally scheduled for June 29, 1978, at 10:00 a.m. A copy of the notice of cancellation is printed on the reverse.

The purpose of the proposed amendments was to conform to the California Supreme Court decision in the case of *Japan Line, Ltd.* v. *County of Los Angeles*, 20 Cal. 3d 180. This case is now before the U.S. Supreme Court.

If the hearing is rescheduled, the time and place of hearing will be announced.

Sincerely,

/s/ Janice Masterton
JANICE MASTERTON
Calendar Clerk

JM/k

NOTICE OF CANCELLATION OF PUBLIC HEARING OF THE BOARD OF EQUALIZATION

By published notice dated March 24, 1978, the State Board of Equalization gave notice of its intention to hold a public hearing to consider revision of the Property Tax Rule 202, Allocation of Aircraft of Certificated Air Carriers And Scheduled Air Taxi Operators. This hearing was originally scheduled to be held on June 29, 1978, begininng at 10:00 a.m. in Room 102 at 1020 N Street, Sacramento, California, 95814.

Notice is hereby given that the hearing on the above matter has been cancelled, and may or may not be rescheduled. In the event of rescheduling, the exact time and place of the hearing will be announced in a subsequent notice.

Dated: June 16, 1978

STATE BOARD OF EQUALIZATION

/s/ Gordon P. Adelman
for DOUGLAS D. BELL
Executive Secretary

APPENDIX C

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

September 7, 1978

The Honorable Wade H. McCree, Jr.
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Dear Mr. Solicitor General:

This is in response to your office's request in the case of *Japan Lines, Ltd.* v. *County of Los Angeles*, 20 Cal. 3d 180, *appeal docketed*, No. 77-1378 (March 28, 1978) for certain information concerning tax practices of foreign countries and for views of the Department of State concerning the case.

We have queried all U.S. embassies as to tax practices in their host countries toward foreign flag carriers and other instruments of foreign commerce. We have received responses from our posts in more than one hundred and twenty countries. According to information developed by our posts, largely from discussions with the pertinent foreign officials and private U.S. flag carriers operating in each country, no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan. Certain foreign jurisdictions impose use taxes, *e.g.*, road

taxes on trucks and harbor use or aircraft landing fees. Afghanistan imposes a tax on containers; we are asking our Embassy to provide further information as to whether this tax applies regardless of whether the container is imported and regardless of ownership by foreign flag carriers. It should be noted that several countries impose taxes or import duties on containers which are not re-exported within a minimum time period (30 days to a year). Some embassies have not yet responded or have indicated that the desired information was not yet available to them. We will notify you promptly should further information come to our attention.

Six foreign governments, including some of our most important trading partners, have written to the Department expressing concern about the California container tax. In addition, twelve countries have sent diplomatic notes objecting to proposed personal property taxation by the State of California of foreign flag aircraft flown to and from California in foreign commerce.

The Department believes that the home-port doctrine, originally announced by the Supreme Court in *Hays* v. *Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855), should be dispositive of the instant case. It precludes the application of *ad valorem* property taxes to an instrumentality of interstate or foreign commerce by all jurisdictions except for the home or domiciliary of the instrumentality. *Id.* at 597-99. Since appellant's cargo containers are mobile equipment used in foreign commerce by foreign flag

vessels domiciled in Japan, the home-port doctrine would prevent California from imposing a property tax on the containers.

Respondents argue that the Court has repudiated the home-port doctrine in favor of an apportionment scheme, whereby each taxing authority having sufficient contacts with the instrumentality of commerce is entitled to levy a tax reflecting the time spent by the instrumentality in its own jurisdiction. Respondents' brief at 9. Whatever the merits of respondents' argument in the context of interstate commerce,* the Court has not abandoned the home-port doctrine for foreign commerce, *see Braniff Airways, Inc.* v. *Nebraska Board of Equalization and Assessment*, 347 U.S. 590, 599-600 (1954); *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 173 (1949). *See also*, Harvard Int'l. Program in Taxation, *World Tax Series: Taxation in the United States* 173 (1963). Indeed, on several occasions the Court has emphasized that non-domiciliary property taxation is permissible under the Commerce Clause of the Federal Constitution *only* where it is possible to prevent multiple taxation exceeding one *ad valorem* value of the taxed

* The Court has never overruled the home-port doctrine announced in *Hays* with regard to all facets of interstate commerce. For example, the Court in *Ott* v. *Mississippi Valley Barge Line Co.*, 366 U.S. 169 (1949), while upholding apportioned taxation of river barges, expressly did not reach the question of ocean-going interstate commerce. *Id.* at 173. See "Developments in the Law-Federal Limitations on State Taxation of Interstate Business," 75 *Harv. L. Rev.* 978, 986-87 (1962).

item, *Central Railroad Co.* v. *Pennsylvania*, 370 U.S. 607, 611 (1962); *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 385 (1952); *Ott* v. *Mississippi Valley*, *supra*, at 174. *Cf. Department of Revenue of Washington* v. *Association of Washington Stevedoring Companies*, 46 U.S.L.W. 4363 (April 26, 1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 288-89, n. 15 (1977).

For instruments of foreign commerce, the Court cannot effectively prevent multiple taxation in excess of one full *ad valorem* tax, except by upholding the home-port doctrine. While in domestic commerce the Court can supervise and correct inequities in the apportionment of interstate tax burdens, the Court has no power to ensure that there is a reasonable allocation of taxing power between states and foreign countries. Under the home-port doctrine, in contrast, the Court is able to maintain American practice in accordance with the internationally accepted rule of domiciliary taxation designed to prevent multiple burdens on foreign commerce. The danger of permitting state taxation of instruments of foreign commerce on an apportioned basis in contravention of the home-port doctrine is evident in circumstances like this case; Japan taxes containers of Japan Lines at their full value under a home-port theory, yet California is seeking to impose additional taxes for time spent in California. It is our view that the risk of pyramiding taxation of instruments of foreign commerce imposed by the taxing authorities of

separate nations can be effectively avoided only by continued adherence to the home-port doctrine in such cases.

The policy underlying *Hays* has been consistently followed in the conduct of our foreign policy. It is reflected, for example, in the 1956 Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. 6634, 338 U.N.T.S. 103, which provides for temporary admission of containers free of import duties, taxes, prohibitions and restrictions, *see* Articles 1(a) and 2-6, *see also* the 1972 Customs Convention on Containers,* Articles 1(a) and 3-11, and in the Convention on International Civil Aviation, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, in which contracting parties undertake to establish uniform customs procedures affecting international air navigation (Article 23) and to admit aircraft and aircraft stores and equipment free of duty, fees and similar national or local duties and charges (Article 24). Our adherence to the home-port doctrine is consistent with nearly universal international practice.

There are important reasons of foreign policy for not disturbing the home-port rule in foreign commerce. While foreign countries, and their political subdivisions, do not now impose property taxes on

* Customs Convention on Containers, 1972, signed at Geneva on Dec. 5, 1972, *reprinted in* [1973] Customs Convention on Containers, 1972, and International Convention for Safe Containers, Senate Doc. Exec. X, 93rd Cong. 1st Sess. 1. Instrument of ratification signed by the President on Oct. 8, 1976. Entry into force for the United States is pending deposit of the instrument of ratification.

U.S. containers or flag carriers, we cannot discount the possibility that such taxes will be imposed in retaliation if the California tax is upheld. Such retaliation would not necessarily be limited to the same degree and kind of taxation imposed by California. The extensive U.S. flag ship, air carrier, and container operations throughout the world could become subject to tax theories of more than a hundred sovereign governments and their countless subdivisions. Retaliation, moreover, may not be restricted to taxation. The United States, for example, now owns a substantial portion of the containers used in foreign commerce. Retaliation could take the form of measures to decrease use of U.S.-owned containers.

It is most unlikely that other countries would alter their approach to taxation to conform to the apportionment theory of property taxation of California. The home-port rule has long been sanctioned by international custom, and nations are unlikely to modify their taxing power over their own containers, vessels, and aircraft because one or more localities of the United States assert a broader power than the international custom.

Conceivably, the United States could seek international agreement on an apportionment rule. However, achieving such agreement as a replacement for the home-port rule would not be practicable, even if the United States were not alone in advocating a new standard. Taxing practices with respect to home-flag carriers vary widely among countries, and rules of reasonable apportionment affecting those practices

would require far more difficult accommodations among sovereign nations than apportionment among states of the United States. A process of bilateral negotiations, either in response to requests of foreign governments as a consequence of a local property tax levy in the United States, or requested by the United States as a consequence of retaliatory foreign action, would likewise be extraordinarily complicated and difficult.

In sum, adherence by the United States to the home-port doctrine with respect to instrumentalities of foreign commerce is consistent with long-standing international practice followed by virtually all governments, and reflects our view that it is the only practical rule to assure that such instrumentalities are not excessively burdened by multiple taxation.

Sincerely,

/s/ Lee R. Marks
LEE R. MARKS
Deputy Legal Adviser

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